Empower Consumers and Everybody Wins

INTELLECTUAL PROPERTY AND CREATIVITY CONFERENCE

Consumer Electronics Association

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In two weeks, the Supreme Court will hear oral arguments in the most important case for the technology industry since the Betamax decision two decades ago. I congratulate CEA and the HRRC, among many other groups, that have filed exceptionally strong briefs with the Court. Like you, I look forward to the decision with anticipation and a bit of trepidation. I share your hope that the Court will get it right and reaffirm the Betamax principle, which you quite properly look to as the Magna Carta of the technology industry. It provides legal certainty to recording device manufacturers, including computers, VCRs, audio cassettes and digital video recorders that if the device is capable of substantial non-infringing applications, the manufacturer of the device is not accountable for contributory copyright liability.

But I don't think it is enough to sit back and hope that the Court will get it right. As in 1984, when you looked to Senator DeConcini to offer the so-called "clean bill," I hope that you will join me in a legislative effort to codify the Betamax decision-just in case.

Winning this fight is not just critical for your industry. It is essential for the whole of society. Permit me to put the challenge in context.

Our Founding Fathers vested in Congress the authority to reward authors for their efforts while at the same time ensuring that the public could gain access to information. From the beginning, there has been broad agreement that our laws should recognize the rights of the creators of intellectual property, as an incentive for the future creation of original works. But just as American law has protected the rights of creators to receive fair compensation, it has also recognized the rights of the users of intellectual property.

Those fundamental user rights are embodied in the Fair Use doctrine.

Students, for example, don't have to get the permission of a copyright owner in order to quote a line from a poem. Nor do any of you need permission to mix a compilation tape or to burn a CD for personal use from music you have purchased. And equally important, none of your engineers and designers has to get the approval of content owners to bring innovative new products to market.

I might add that the Fair Use doctrine has benefited not just consumers and your industry, but Hollywood and other content producers as well. Some of the most widely acclaimed Disney movies, for example, draw heavily on preexisting stories. Snow White and Cinderella are based upon Grimms' Fairy Tales. The Little Mermaid, The Jungle Book, and The

Hunchback of Notre Dame are based upon modern literary works by Hans Christian Anderson, Rudyard Kipling, and Victor Hugo, respectively.

This is as it should be. Fair Use and other doctrines that limit the rights of copyright owners are an important feature of U.S. copyright law-not an historical mistake. The entertainment and information industries of the United States have enjoyed success without parallel in the world. In my view, this success has occurred not in spite of Fair Use but because of it.

Notwithstanding the importance of Fair Use to creativity and the benefits that flow from empowering the users of intellectual property, content owners have routinely sought to restrict the ways in which consumers could use new technology. As technology has changed, content owners have reacted in ways intended to preserve existing business models at the expense of consumer freedom and innovation. Piano rolls were legally challenged by sheet music publishers. Radio, in its infancy, was seen as a threat to live performances and also subject to challenge. And, as this group knows all too well, two movie studios sought to block Sony from selling the Betamax video recorder.

Fortunately for consumers, for your industry, and for Hollywood, the Supreme Court held that Sony was not liable for contributory copyright infringement because the VCR was capable of substantial non-infringing uses.

The real value of that decision was not so much that it permitted manufacturers to build a device that could record. The real and enduring value has been that the decision embraced a broad principle. It said that any time technology has both infringing and non-infringing applications, you don't have to look to the intent of the manufacturer. You don't have to look to the intent of someone who sells the product. All you have to do is examine whether or not the device is capable of substantial non-infringing applications. If so, the device itself should not be outlawed.

This important principle has stood the test of time - the VCR unleashed a new market for consumers in the rental and home viewing of movies. The demand for VCR tapes exploded, and Hollywood benefited immensely. We must remind ourselves how close our nation came to outlawing the VCR and the negative effects that banning that device would have had for consumers, technology companies, and movie producers, as we enter today's debate.

That debate revolves largely around the controversial Digital Millennium Copyright Act (DMCA) - a law that I worried about in 1998 as it was being propelled through Congress. I worried that enactment of overly broad legislation would stifle new technology, would threaten access to information, and would move our nation inexorably towards a "pay per use" society.

Apparently having forgotten the value of the Betamax decision, Hollywood and content owners came to Congress saying, in effect, "digital is different." The motion pictures studios, record companies, book publishers, and other owners of copyrighted works told Congress that legislation was needed to stop "pirates" from "circumventing" technical protection measures used to protect digital works.

Unfortunately, Congress largely adopted what content owners asked for. As a result, the DMCA contains a fundamental defect: it prohibits circumvention of access controls for lawful purposes.

In other words, it upset the copyright balance that had existed for centuries - it essentially said that all those rights of users of intellectual property, which are contained in over 50 pages of the U.S. Code, are essentially meaningless. Even if you have the right to use material in a lawful way, if you have to bypass a lock on the material in order to do so, you have committed a felony and a civil wrong.

In the past two years, it has becoming increasingly clear that the DMCA is being abused in ways never imagined by Congress. From a small start-up company being sued by a larger established company seeking to keep it from introducing a universal garage door opener to an established computer printer manufacturer seeking to limit competition in the toner cartridge market, no one in Congress could have contemplated at the time that we adopted the DMCA that it would be used to thwart legitimate competition in this fashion.

A law designed to prevent piracy of digital media has morphed into a law against using a different door opener or printer cartridge. Fortunately, the courts have rejected these efforts to misapply the DMCA. But you can only imagine what will be next as product manufacturers find creative ways to use the DMCA in an effort to block their competitors.

And to top that off, content owners are now essentially seeking to ban all p2p software and hardware that they don't approve of. As you recognize, the Grokster case is not just about the sharing of pirated songs. As a group of computer scientists pointed out in their brief to the Supreme Court, it is a fundamental attack on the Internet.

Rather than belabor the problems, I am here to reconfirm my commitment to finding a solution. It is a solution in which everybody wins. It is a solution we can achieve only if we work together and make sure every Member of Congress understands how important the Betamax decision has been and how important its preservation will be to the future of your industry. And I need you as well to make sure that every Member of Congress understands that we can amend the DMCA in ways that promote fair use without threatening intellectual property rights.

Last week, I introduced a bill with my colleagues John Doolittle and Joe Barton entitled, "the Digital Media Consumers' Rights Act of 2005, H.R. 1201". (You'll have to admit that's a great bill number.)

Our bill seeks to restore the balance in our nation's copyright laws in ways that will promote technological innovation and consumer freedom, while at the same time ensuring that record companies, movie studios, and book producers can stop pirates from stealing.

First, our bill would codify the Supreme Court's Betamax decision. Plain and simple: If a hardware or software product or service is capable of substantial noninfringing uses, it cannot be banned from the market. Period.

Second, we have included a provision to preserve the Fair Use rights of consumers. When our bill becomes law, a consumer will be able to circumvent a technological protection measure to gain access to a work for noninfringing

purposes. In short, if a consumer is entitled to make Fair Use of a copyrighted work, he may also bypass the protection measures in order to make that Fair Use.

Finally, we have included provisions to ensure our scientists can engage in legitimate encryption research and that consumers will get fair warning before they purchase a copy-protected CD.

The bill remains tough on pirates. Those who would circumvent technological protection measures in order to infringe copyrights or who sell "black boxes" that merely strip away content protection for unlawful uses would remain subject to all the severe additional civil and criminal penalties established under the DMCA.

In closing, let us recall where we stood two decades ago when an entire industry's future was at stake. In 1984, as both sides prepared for the outcome of the Betamax case, they marshaled their forces on the Hill. Your industry was prepared, and it won.

We face an equally daunting challenge today. I ask you to join me in making sure that the rights and freedoms we have come to enjoy will be preserved, no matter what the Supreme Court rules in the Grokster case. We need to marshal our forces again to this noble end.

You have it within your power to ensure that technology will trump the efforts to preserve existing business models. You have it within your grasp to ensure that you continue to have the freedom to bring new products to market. You have the ability to win this fight.

For the sake of consumers and for the sake of our nation's technological leadership, let's work together to enact H.R. 1201.

Thank you.